as an adopted child, hence the heir of its adopting parent.[20] But adoption properly is an assumption of the relation of parent to the child of another.[21] The "adoption" of one's natural child is legitimation, and within the inhibition of the Statute of Merton. Conceding this, and even assuming the Statute of Merton not to have been repealed in Illinois, the principal case is sound. California has termed the proceeding herein an adoption. The law of Illinois recognizes and permits adoption, and the court's attitude toward adopted children has been consistently liberal.[22] Far from violating public policy, the decision shows an enlightened appreciation of a social problem, now occupying the attention of the legislatures throughout the country.[23] It would be anomalous and unjustifiable, that the same law should deny to this child the property of its natural parent and permit the illegitimate child of another to inherit as an adopted child.[24]

CONTRACTS ILLEGAL UNDER THE CLAYTON ACT. — The Clayton Act, passed "to supplement existing laws against unlawful restraints and monopolies," [1] makes illegal certain contracts if they "may substantially lessen competition or tend to create a monopoly." [2] The law hitherto reached only unreasonable "restraints of trade," [3] applying the test of "the standard of reason which had been applied at common law." [4] It is thus extended by this Act, which seeks to

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[20] See *supra*, note 3.

[21] See Blythe *v.* Ayres, 96 Cal. 532, 559, 31 Pac 915, 916 (1892).

[22] *Cf.* Butterfield *v.* Sawyer, 187 Ill. 598, 58 N. E. 602 (1900); Flannigan *v.* Howard, 200 Ill. 396, 65 N. E. 782 (1902).

[23] See 1921 Mo. LAWS, 118. See p. 96, *infra*.

[24] See 1921 CAHILL'S ILL. REV. STAT., c. 4, § 9

[1] See Act of October 15, 1914, c. 323; 38 STAT. at L. 730; U. S. COMP. STAT. § 8835.

[2] 38 STAT. at L. 731, § 3.

[3] The early common law view, that all restraints were illegal, was soon broadened and the test of the reasonableness of the restraint was applied. See Standard Oil Co. *v.* U. S., 221 U. S. 1, 58 (1911). See also A. M. KALES, CONTRACTS AND COMBINATIONS IN RESTRAINT OF TRADE, c. 1; 3 WILLISTON, CONTRACTS, § 1633 *et seq.* In the United States doubt as to the law and a growing tendency toward combination resulted in the enactment of the Sherman Anti-Trust Act. See 21 CONGRESSIONAL RECORD 3151–3152. See also Standard Oil Co. *v.* U. S., *supra*, at 50. After adhering literally to the words of the statute for 20 years, the Supreme Court ceased to hold contracts and combinations illegal unless the restraint imposed was unreasonable. See Standard Oil Co. *v.* U. S., *supra*; U. S. *v.* American Tobacco Co., 221 U. S. 106 (1911). See also Robt. L. Raymond, "The Standard Oil and Tobacco Cases," 25 HARV. L. REV. 31; A. M. Kales, "The Sherman Act," 31 HARV. L. REV. 412; Henry J. Steele, "The Sherman Anti-Trust Law," 6 CORN. L. Q. 217, 220. For the view that the distinction between "good" and "bad" trusts is unjustifiable, see Myron W. Watkins, "The Change in Trust Policy," 35 HARV. L. REV. 815, 926.

[4] As to the other possible standards to be applied, see A. M. KALES, *op. cit.*, 106–108. It is to be noted that in applying "the standard of reason which had been applied at common law," the Supreme Court is entitled to declare for itself what the common law may be, preliminary to applying the Sherman Act; hence certain conduct may be held illegal though there may be common law precedents to the contrary. Dr. Miles' Medical Co. *v.* Park & Sons Co., 220 U. S. 373, (1911).

check monopolistic tendencies in their incipiency.[5] Conduct hitherto considered illegal is now *a fortiori* illegal. The question arises as to what conduct, previously sanctioned, is now to be condemned. In determining the test of illegality under the Clayton Act, the cases decided under the Sherman Act[6] are relevant in so far as they indicate and stress certain factors regarded as objectionable.[7]

It is clear that methods actually preventive of competition or acts indicative of a purpose to employ such methods are illegal.[8] What of mere size? This may mean (1) magnitude,[9] or (2) predominance in a given field.[10] The trend of the decisions in the federal courts has been to sanction size rather than to consider it as constituting illegality.[11] As a consequence, the United States Steel Corporation

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[5] See Standard Fashion Co. *v.* Magrane-Houston Co., 259 Fed. 793, 795-797 (1st Circ., 1919); U. S. *v.* United Shoe Machinery Co., 264 Fed. 138, 161 (E. D. Mo., 1920). But see A. M. KALES, *op. cit.*, § 156. *Cf.* U. S. *v.* United Shoe Machinery Co., 247 U. S. 32 (1918), in which case the Supreme Court held the combination legal under the Sherman Act.

[6] See Act of July 2nd, 1890, 26 STAT. at L. 209; U. S. COMP. STAT. § 8820.

[7] Although the Clayton Act refers specifically to contracts where the buyer agrees not to buy goods from the seller's competitors, the same considerations apply as in the case of combinations, for such a contract is in reality a method of combination which results in eliminating competition for this particular buyer's trade. See A. M. KALES, *op. cit.*, § 26.

[8] U. S. *v.* Standard Oil Co., *supra;* U. S. *v.* American Tobacco Co., *supra.* See A. M. Kales, "Good and Bad Trusts," 30 HARV. L. REV. 830, reprinted in A. M. KALES, *op. cit.*, c. V.

[9] The most frequently advanced objection to size is that it permits intimidation of small units and tends to exclude competition. But an evil urged as more serious lies in the fact that great size tends to inefficiency when the point is reached where the human mind cannot grasp all the facts necessary for a sound exercise of judgment. See LOUIS D. BRANDEIS, BUSINESS — A PROFESSION, 198 *et seq.*

"The proposition that mere bigness cannot be an offense against society is false . . . You may have an organization in the community which is so powerful that in a particular branch of the trade it may dominate by mere size. Although its individual practices may be according to rules, it may be nevertheless, a menace to the community." See testimony of Louis D. Brandeis, Hearings before the Committee on Interstate Commerce of the U. S. Senate, 62nd Congress, December 14, 1911. Part XVI, 1167.

However it has been pointed out, in answering this contention, that it is inconsistent to say that mere size excludes others and at the same time results in such inefficiency that others are able to enter the business easily and to compete successfully. See A. M. KALES, *op. cit.*, 74.

[10] *Cf.* Addystone Pipe & Steel Co. *v.* U. S., 175 U. S. 211, (1899). "The essence of restraint is power; and power may arise merely out of position. Wherever a dominant position has been attained, restraint necessarily arises. And when dominance is attained, or is sought, through combination . . . the Sherman Law is violated, provided, of course, that the restraint be what is called unreasonable." *Per* Brandeis, J., dissenting, in American Column & Lumber Co. *v.* U. S., 42 Sup. Ct. Rep. 114, 121 (1921). See U. S. *v.* International Harvester Co., 214 Fed. 987, 1001 (D. Minn., 1914).

[11] The evils that result from size are to be balanced against the facilities and economies resulting from combination — at least, combination to a certain extent. Such a balancing may lead to three views as to the effect of size. It may constitute: — (1) illegality *per se;* (2) presumptive evidence of illegality, requiring, in order to defeat the *prima facie* case, proof of lack of monopolistic methods and purposes; (3) merely some evidence of illegality. See A. M. KALES, *op. cit.*, 57. These views have all been accepted at various times in the federal courts. See Standard Oil Co. *v.* U. S., 221 U. S. 1, 75 (1911);

was held legal.[12] On the other hand, the Supreme Court held illegal a combination where size, in either sense, was negligible.[13] However, in a recent case[14] decided under the Clayton Act, the Supreme Court, in holding illegal certain leases containing restrictive "tying" clauses, stressed the fact that the offending party controlled 95 per cent of the industry. The attitude of the Supreme Court thus becomes very problematical and results in great uncertainty in this field of the law unless a new test of illegality can be found.

There is indication that such a test is being sought in another case[15] recently decided under the Clayton Act. A manufacturer of patterns, controlling only 40 per cent of the industry, was denied an injunction against a retail dealer who violated his promise not to purchase from the plaintiff's competitors. There is no other evidence of "preventive purposes or illegal preventive acts." In holding the agreement illegal, the court relied largely on the peculiar circumstances of the case.[16] It thought a slight control of the pattern market would rapidly lead to complete monopoly.

The case is thus a departure from the tests of illegality applied under the Sherman Act; and if only size and overt acts are to be considered, the result might well be questioned.[17] In introducing as a controlling factor the prejudice to the public in the light of all the circumstances of the particular case before the court, the Supreme Court takes a position in conformity with common law views.[18] It may be urged that such a test, in the application of which the economic and social viewpoint of the court should have great weight,[19] leaves open the whole question. However, it will make possible a solution more satisfactory than that reached in the *Lumber Association* case,[20] where the majority of the court seemed to look blindly for certain accepted *indicia* of illegality. Such a method is

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U. S. *v.* Reading Co., 226 U. S. 324, 370 (1912); U. S. *v.* Keystone Watch Case Co., 218 Fed. 502, 518 (E. D. Pa., 1915); U. S. Steel Corp. *v.* U. S., 251 U. S. 417, 451, 460 (1920).

[12] U. S. *v.* U. S. Steel Corp., 251 U. S. 417, (1920) (4–3 decision).

[13] American Column & Lumber Co. *v.* U. S., 42 Sup. Ct. Rep. 114, (1921) (Holmes, Brandeis and McKenna, JJ., dissenting). See, for an adverse criticism of this case, 31 YALE L. J. 643; 22 COL. L. REV. 377.

[14] United Shoe Machinery Corp. *v.* U. S., 42 Sup. Ct. Rep. 363 (1922); rehearing denied, October 9, 1922. This case, although attracting much popular interest, is not very significant, as the contracts were clearly illegal under any test. See 227 Fed. 507, 510 (E. D. Mo., 1915). For the facts of this case, see RECENT CASES, *infra*, p. 111.

[15] The Standard Fashion Co. *v.* Magrane-Houston Co., 42 Sup. Ct. Rep. 360 (1922). For the facts of this case, see RECENT CASES, *infra*, p. 111.

[16] "We must consider the restriction in the light of the facts peculiar to the business to which the restraint is applied, to the conditions already achieved under the restraint, as well as to the nature of the restraint and its effect, actual and probable." *Per* Anderson, J., in Standard Fashion Co. *v.* Magrane-Houston Co., 259 Fed. 793, 798 (1st Circ., 1919).

[17] Brown, J., concurring in the result in the Circuit Court of Appeals, held the contract legal under the Clayton Act. See 259 Fed. 793, 803.

[18] See Myron W. Watkins, "The Change in Trust Policy," 35 HARV. L. REV., 815, 926.

[19] See note 13, *supra*.

[20] A suggested solution is an extension of the powers of the Federal Trade Commission. See Henry J. Steele, *supra*, 6 CORN. L. Q. 217, 225.

too narrow to deal with the large industrial units of today.[21] No more definite test can be applied to the varied and complicated cases that will arise under this section of the Clayton Act than a standard of reasonableness under all the circumstances, considering, as factors in determining whether the public is prejudiced, the nature of the business, its size and the methods employed, and the resultant social as well as economic consequences.

ACTION UNDER THE CODES AGAINST REPRESENTATIVE DEFENDANTS. — The code provision for the representation of large numbers,[1] "class suits," is adopted from the old practice in chancery,[2] and applies to legal and equitable actions.[3] The code contemplates a procedural remedy[4] designed to decrease litigation.[5] Justice and fairness[6] to the parties, therefore, should alone limit its application. An Ontario court[7] refused to order the representation of a class of defendants, on the grounds that "common interest" in a correspond-

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[21] See U. S. *v.* Keystone Watch Case Co., 218 Fed. 502, 519 (E. D. Pa., 1915); Hubbard *v.* Miller, 27 Mich. 15, 19, (1873).

[1] "When the question is one of a common or general interest of many persons, or when the parties are very numerous and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of all." See 1920 NEW YORK LAWS, c. 925 as amended 1921, art. 24, §195; PARSONS, PRACTICE MANUAL NEW YORK (1921), 81. This provision is common to the modern American practice codes. See POMEROY, CODE REMEDIES, 4 ed., 379, 380 n. 1.

Under the English rule a court order is necessary to authorize suing one or more defendants on behalf of all. See RULES OF SUPREME COURT, 1883, Order XVI, rule 9; ANN. PRAC. 1922, 233, 236; CONSOLIDATED RULES OF PRAC. AND PROC. OF SUP. CT. OF JUD. (Ont.), rule 75. See HOLMSTED, ONT. JUD. ACT, 4 ed., 435.

[2] See George *v.* Benjamin, 100 Wis. 622, 629, 76 N. W. 619, 621 (1898); Duke of Bedford *v.* Ellis, [1901] A. C. 1, 8. See POMEROY, *op. cit.*, 384–5.

[3] Platt *v.* Colvin, 50 Ohio St. 703, 36 N. E. 735 (1893); Penny *v.* Central Coal and Coke Co., 138 Fed. 769 (8th Circ., 1905). See POMEROY, *op. cit.*, 175.

[4] See POMEROY, *op. cit.*, 268–9.

[5] For multiplicity as a ground of equity jurisdiction, see 1 POMEROY, EQUITY JURISPRUDENCE, 3 ed., § 243 *et. seq.*

[6] The practice in chancery of permitting one or more to sue or defend on behalf of all is old. See Cockburn *v.* Thompson, 16 Ves. 321, 327 (1809); Adair *v.* New River Co., 11 Ves. 429, 443 (1805); West *v.* Randall, 2 Mason (R. I.) 181, 193–6 (1820). As the general rule of making necessary all parties having an interest apparent on the record in the object of the suit was a rule of convenience, so the departure therefrom by a representative suit was prompted by convenience. See CALVERT, PARTIES TO SUITS IN EQUITY, 2 ed., 21 *et seq.* The question must have been one of common or general interest, or the parties must have been too numerous to be brought before the court. See STORY, EQUITY PLEADING, 10 ed., § 97 *et seq.* There must have been such defendants on the record as fairly to maintain the several interests adverse to those of the plaintiff. See CALVERT, *op. cit.*, 43. The right to be tried had to be in the nature of a general right. Adair *v.* New River Co., *supra.* For the operation in equity, see in addition: American Steel and Wire Co. *v.* Wire Drawers' Union, 90 Fed. 598 (N. D. Ohio, 1898); Smith *v.* Swormstedt, 16 How. (U.S.) 288 (1853); Supreme Tribe of Ben-Hur *v.* Cauble, 255 U. S. 356 (1921). See FEDERAL EQUITY RULES, 38, 198 Fed. xxix.

[7] Barrett *v* Harris, 21 Ont. W. N. 293 (1921). For the facts of this case, see RECENT CASES, *infra* p. 110.